82-235

In the

Supreme Court of the United States

October Term, 1982

No._____

G. PATRICK MORRIS, et al,

Petitioners,

vs.

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

William F. Ringert
P.O. Box 2773
Boise, Idaho 83701
(208) 342-4591
Attorney for Petitioners

QUESTIONS PRESENTED

1. Whether the administrative complaints conferred jurisdiction for cancellation of the entries.

2. Whether the courts below had jurisdiction to decide the assignment issue.

3. Whether the Court of Appeals had jurisdiction of the first appeal and, it it did, the extent of that jurisdiction.

4. Whether the leases and mortgages violated the holding limitation of 43 U.S.C. § 329.

5. Whether violation of the holding limitation of § 329 is ground for cancellation of the entries.

6. Whether the IBLA's interpretation of 43 U.S.C. § 329 can be applied to these entries.

7. Whether the IBLA's decision is supported by substantial evidence.

8. Whether the District Court erred by denying the petitioners' motion for leave to amend the complaint.

9. Whether 43 U.S.C. § 329, as applied, is unconstitutionally vague.

10. Whether the petitioners' rights of due process were violated by the actions of either the IBLA or the courts below.*

*The parties not listed in the caption are Milo Axelsen, Peggy M. Axelsen, Charlene S. Baltzor, George R. Baltzor, Juanita M. Morris, Elise L. Neeley, Vera M. Baltzor, Joan E. Roth, Lyle D. Roth, and Farm Development Corporation, an Idaho corporation, of which Sailor Creek Water Company is a wholly owned operating division. John E. Morris, an entryman who was a party in the administrative proceedings, and Nellie Mae Morris, an entrywoman who was a party in the administrative and judicial proceedings, have died, and their entries have been devised to G. Patrick Morris.

TABLE OF CONTENTS

	Page
Questions Presented	i
Opinions Below	2
Jurisdiction	2
Constitutional Provisions, Statutes and Regulations	2
Statement of the Case	2
Reasons for Granting the Writ	11
Conclusion	29
Appendix A, Opinion of the Court of Appeals dated 11-16-78	A-1
Appendix B, Order of the Court of Appeals Amending Opinion and Denying Petition for Rehearing dated 4-9-79	B-1
Appendix C, Memorandum of the Court of Appeals dated 3-5-82	C-1
Appendix D, Decision of the Administrative Law Judge dated 1-29-71	D-1
Appendix E, Decision of the Interior Board of Land Appeals dated 4-7-75	E-1
Appendix F, Findings, Conclusions and Order the District Court dated 12-17-76 and Judgment of the District Court dated 12-20-76	F-1

Appendix G, Memorandum and Order of Dismissal by the District Court dated 6-23-80 ..... G-1

Appendix H, Judgment of the District Court dated 6-23-80 ..... H-1

Appendix I, Order of the District Court dated 10-9-80, Denying Motion to Amend..... I-1

Appendix J, Judgment of the Court of Appeals entered 11-16-78 ..... J-1

Appendix K, Judgment of the Court of Appeals entered 3-5-82 ..... K-1

Appendix L, Order of the Court of Appeals Denying Rehearing dated 4-16-82 ..... L-1

Appendix M, Constitutional and Statutory Provisions and Regulations M-1

TABLE OF AUTHORITIES

Cases: Page

Abbotsford, The, 98 U.S. 440 19

Abney v. United States, 431 U.S.651 13

Alaska Placer Co., 84 I.D. 990 22

Alexander v. Cosden Pipe Line Co., 290 U.S. 484 . 13

American Textile Institute v. Donovan, 452 U.S. 490 15

Andrus v. Charlestone Stone Products Co., 436 U.S. 604 19

Andrus v. Shell Oil Co., 446 U.S. 657 17

Ashwander v. TVA, 297 U.S. 288 28

Bandy, Albert A., 41 L.D. 82 15

Barker Painting Co. v. Local No. 734, Brotherhood of Painters, Decorators, and Paperhangers of America, et al, 281 U.S. 472 (1930) 13

Barnhurst v. State of Utah, 30 L.D. 314 23

Benson Mining & Smelting Co. v. Alta Mining & Smelting Co., 145 U.S. 428 24

Bingham, Wallace S., 82 I.D. 377 15

Bond's Heirs v. Deming Townsite, 13 L.D. 665. . . 17

Bright's Lessee v. Rochester, 20 U.S. (7 Wheat.) 535 18

Buschmann v. Schweiker, 676 F. 2d 352 27

Calhoun v. Bailar, 626 F. 2d 145 28

Catholic Bishop v. Gibbon, 158 U.S. 155 (1895) 21-22

Century Investment Corporation v.
United States, 277 F. 2d 247 13

Chevron Oil Company v. Huson, 404 U.S. 97 27

Chrysler Corporation v. Brown, 441 U.S. 281 27

Church of the Holy Trinity v.
United States, 143 U.S. 457 19

Cohen v. Beneficial Industrial Loan
Corporation, 337 U.S. 541 13

Donovan v. Penn Shipping Co., Inc., 429 U.S. 648 13

Evans, In re, 253 F. 956 23

Firestone Tire & Rubber Co.
v. Risjord, 449 U.S. 368 12

Forgay v. Conrad, 47 U.S. (6 How.) 201 13

Fountain v. Filson, 336 U.S. 681 14,28

Freeman v. Laxson, 48 L.D. 519 8

French, Ex Parte, 91 U.S.423 13

French's Lessee v. Spencer,
62 U.S. (21 How.) 228 24

Gardinier, Robert B., 19 L.D. 83 17

Harden v. Fisher, 14 U.S. (1 Wheat.) 300 18

Harris v. McRae, 448 U.S. 297 28

Heinzman v. LeTroadec's Heirs, 28 L.D. 497 17

Hepworth, Wells, Idaho 07289 5

Hill v. Federal Power Commission, 335 F. 2d 355. 16

Hodel v. Virginia Surface Mining and Reclamation Association, 452 U.S. 264..... 14

Hollerbach v. United States, 233 U.S. 165..... 24

Hormel v. Helvering, 312 U.S. 552..... 28

Hoska v. U.S. Department of the Army, 677 F.2d 131 28

Instructions, 6 L.D. 145 23

INS v. Wang, 450 U.S. 139..... 15,24

Jennison v. Leonard, 88 U.S. 302 24

Jensen, Glenn M. and Margie R., A-29867..... 18

Kepner v. United States, 195 U.S. 100..... 19

Lorillard v. Pons, 434 U.S. 575..... 19,20

Loudon v. Taxing District of Shelby County, 104 U.S. 771 13

Lynch v. United States, 292 U.S. 571..... 23

Morgan v. United States, 304 U.S. 1 16

Neely v. Eby Construction Co., 386 U.S. 317..... 14

NLRB v. Bell Aerospace Co., 416 U.S. 267 27

North Alabama Express, Inc. v. United States, 585 F. 2d 783..... 12

Orr v. Hodgson, 17 U.S. (4 Wheat.) 453..... 18

Pennoyer v. McConnaughy, 140 U.S. 1..... 23

Rector v. Gibbon, 111 U.S. 276..... 22

Rescue Army v. Municipal Court, 331 U.S. 549 .. 28

Robertson v. Pickerell, 109 U.S. 608 19

Sekaquaptewa v. MacDonald, 575 F. 2d 239 13

Service v. Dulles, 354 U.S. 363 16

Slocum v. New York Life Insurance Company, 228 U.S. 364 14

Southern Pacific Transportation Co. v. Commercial Metals, ____ U.S. ____ 26

Stark v. Starr, 73 U.S. (6 Wall.) 402 24

Steadman v. SEC, 450 U.S. 91 27

S.R.A. v. Minnesota, 327 U.S. 558 19

Union Pacific Railroad Company v. United States, 99 U.S. 700 23

United States v. Healey, 160 U.S. 136 17

United States v. Standard Oil Company of California, 618 F. 2d 511 28

Vitarelli v. Seaton, 359 U.S. 535 16

Watt v. Alaska, 451 U.S. 259 19

Wharton, Minnie E., et al, 79 I.D. 6 21

Williams v. Kirk, 38 L.D. 429 17

Williamson v. Berry, 49 U.S. (8 How.) 495 23

Willner v. Committee on Character & Fitness, 373 U.S. 96 16

Yarbrough, Waymon D., Idaho 07212 5

Constitutional Provisions:

United States Constitution, Amendment V 2

Statutes and Regulations:

5 U.S.C. § 552 (a) (1) ..... 2, passim
5 U.S.C. § 553 (b) (d) 26,27
5 U.S.C. § 554 (a) and (b) (3) ..... 2, passim
5 U.S.C. § 556 (a), (d) and (e) 2,27,28
5 U.S.C. § 557 (c) 2,10
5 U.S.C. § 558 (a) and (b) 2
43 U.S.C. § 321 2
43 U.S.C. § 324 2,9,15
43 U.S.C. § 329 ..... 2, passim
43 U.S.C. § 1201 2,25
43 C.F.R.§ 232.18(a) (1963) 2,24
43 C.F.R.§ 232.18(d) (1963) 2,3
43 C.F.R.§ 1852.1-4(a)(4) (1966) 2,15
43 C.F.R.§ 1852.1-1(a) (1966) 2
43 C.F.R.§ 1852.3-2 (1966) 5
43 C.F.R.§ 2226.1-2(c)(3) (1964) 8
43 C.F.R.§ 2521.3(c)(3) (1981) 2

In the

Supreme Court of the United States

October Term, 1982

No._____

G. PATRICK MORRIS, et al,

Petitioners,

vs.

UNITED STATES OF AMERICA and JAMES G. WATT, SECRETARY OF THE INTERIOR OF THE UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH DISTRICT

Petitioners pray that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Ninth Circuit entered herein on November 16, 1978, as amended on April 9, 1979, and the judgment and decisions of that Court entered on March 5, 1982 and April 16, 1982.

William F. Ringert
P.O. Box 2773
Boise, Idaho 83701
(208) 342-4591
Attorney for Petitioners

OPINIONS BELOW

The opinions of the District Court (Apps. D and F, infra, are not reported. The first opinion of the Court of Appeals (App. D, infra) is reported at 593 F. 2d 851. The second opinion of the Court of Appeals (App. C, infra) was issued as a Memorandum and will not be reported.

JURISDICTION

The judgment of the court below (App. C, infra) was entered on March 5, 1982. A timely petition for rehearing was denied on April 16, 1982. On July 7, 1982, Justice Rehnquist entered an order of this Court extending the time for filing a petition for a writ of certiorari in this cause to August 16, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS

This case involves the following constitutional provisions, statutes and regulations: U.S. Const., Amend. V; U.S.C. § 552, 5 U.S.C. § 554, 5 U.S.C. § 554(b)(3), 5U.S.C. § 556(d), 5 U.S.C. § 557(c), 5 U.S.C. § 558(b), 43 U.S.C. § 321, 43 U.S.C. § 324, 43 U.S.C. § 329, 43 U.S.C. § 1201, 43 U.S.C. § 232.18(a) and (d) (1963), 43 C.F.R. § 1852.1-1(a)(4) (1966), 43 C.F.R. § 1852.2-2 (1966), 43 C.F.R. § 2[illegible]6.1-1(c)(3) (1964), and 43 C.F.R. § 2521.3(c)(3) (1981).

STATEMENT OF THE CASE

In 1963 twelve qualified citizens of the United States (the entrymen) filed applications for entries on 3,781.62 acres of land in Idaho, under the Desert Land Act, 43 U.S.C. § 321, et. seq., Act of March 3, 1877, 19

Stat. 377, as amended. The regulations of the Department of the Interior (Department) in effect at that time permitted mortgages on desert entries,[1] but did not define the word "hold" as used in 43 U.S.C. § 329, did not mention leases, did not require the entryman to be personally involved in the cultivation and irrigation of the land, or state that settlement was involved in the holding limitation of § 329. A representative of the entrymen advised the Bureau of Land Management (BLM) that several of the entries would be leased to a single operator for farming.

The entrymen contracted with Sailor Creek Water Company (Sailor Creek) for construction of a main irrigation system and purchase of water rights, with payment secured by mortgages on the entries. Those contracts, with copies of the mortgages attached, were submitted to the BLM as part of the application procedure. In August of 1963 the BLM approved Sailor Creek as source of water, and between November of 1963 and March of 1964 the BLM approved the applications and "allowed" the entries.

In late September of 1963 eleven entrymen leased their entries to the twelfth entryman (Morris) and Allen Noble, for two years, with two five-year renewals, on a cash rent basis. The leases were discussed with BLM representatives before they were made. As each entry was allowed, the lease for that entry was recorded in the county records. Early in 1964 Morris and Noble subleased for one year to Sailor Creek, and Morris leased his to Sailor Creek for 1964.

[1] 43 C.F.R. § 232.18(d).

In June of 1964 the entrymen submitted final proof and made final payment as required by 43 U.S.C. § 329. The BLM field report on final proof noted that the entries were being farmed by Sailor Creek under contract with the entrymen. About a month after final proof the BLM requested the entrymen to furnish copies of their contractual arrangements, noting that "there is nothing of record with this office that shows such contractual arrangements."[2] The requested copies were furnished approximately two weeks later.

In September of 1964, after being informed of a decision made in the Indian Hill case (Note 4, infra) by the Director of the BLM in August of 1964, which held that the holding limitation of 43 U.S.C. § 329 applied only to the holdings of entrymen, and did not apply to mortgagees or lessees, Morris assigned his interest in the eleven leases to Sailor Creek, and leased his entry to Sailor Creek for 1965 with two five-year renewals. Noble assigned his interest in the leases to Sailor Creek in February of 1965.

In April of 1965 the Secretary of the Interior (Secretary) issued an order[3] setting aside the BLM Director's 1964 decision, based on an opinion rendered by the Solicitor of the Department on April 5, 1965.[4] The BLM did not notify the entrymen that the new interpretation of § 329 would be applied to their entries, and did not order them to cancel the leases and mortgages.

---

[2] Administrative Record (AR), Exhibit G-2, Doc. 33.

[3] 72 Interior Decisions 182-183. Volumes 1 through 52 of the decisions of the Department of the Interior are cited ___ L.D. ___; Volume 53 and all subsequent volumes are cited ___I.D.___

[4] 72 I.D. 156.

In May of 1966 the BLM filed administrative complaints against the entries. The charges were stated as conclusions of law, instead of the statements of the facts relied upon required by the Department's pleading regulations.[5] There was no charge that the mortgages and leases resulted in holding by Sailor Creek. The entrymen's requests for clarification of the charges were denied. The notice of hearing did not state the matters of fact and law asserted as required by 5 U.S.C. § 554(b)(3) and 43 C.F.R. § 1852.3-2 (1966).

After a 38-day hearing the Administrative Law Judge (ALJ) issued a decision[6] in favor of the entrymen on all charges and directed issuance of patents. He expressly found that the entrymen acted in good faith. The Government appealed that decision to the Interior Board of Land Appeals (IBLA).

While the appeals to the IBLA were pending, the Department acquiesced in a decision which upheld two desert land entries aggregating 600 acres which had been developed by a partnership under leases permitting the tenants to "have and hold" the land for five years, with the tenants constructing and paying for the irrigation system and paying for all farming operations and receiving all crop income from the land.[7] The ALJ in that case rejected the BLM's contention that the lease arrangements constituted assignments of the entries and that the tenants held more than 320 acres of desert land prior to issuance of patent in violation of § 329.

[5] 82 I.D. at 147, App. M, at M-8; 43 C.F.R. § 1852.1-4(a)(4) (1966 Revision).

[6] Appendix D, p. D-1, Decision, dated January 29, 1971.

[7] *Waymon D. Yarbrough*, Idaho 07212, *Wells Hepworth*, Idaho 07289, February 15, 1972.

In 1975 the IBLA issued its decision on these entries, ruling that Sailor Creek, through the leases and mortgages, held more than 320 acres of desert land and that, because it found the BLM had no knowledge of the "totality of the arrangements" until it "required" copies of the contractual arrangements, the Government was not estopped from applying its 1966 interpretation of 43 U.S.C. § 329 to these entries. The only evidence considered by the IBLA on the knowledge issued was the letter from the BLM (Note 2, supra), which was admitted over objections of hearsay, irrelevance and incompetence.[8]

The IBLA did not explain or distinguish the ALJ's finding that the BLM knew in 1963 that the entrymen intended to obtain 100% financing and to lease the entries to a single farming entity. The IBLA did not reverse the ALJ's determination that the transactions did not constitute assignments of the entries, nor did it disturb his finding that the entrymen acted in good faith.

The IBLA ordered rejection of the final proofs and cancellation of the entries, without affording the entrymen any opportunity to comply with the new interpretation of § 329, and without any explanation of its abrupt departure from the Department's long standing policy of giving only prospective operation to changes in interpretation of the Desert Land Act or any explanation why the interpretation must be applied retroactively.

---

[8]Tr. of Pre-hrg. Conf., at 22.

The entrymen filed an action in the United States District Court for the District of Idaho to have the IBLA's decision set aside and to compel the Secretary to issue patents on the entries. The action was against the United States and the Secretary (collectively, the Government). The issues raised by the complaint included erroneous interpretation of the statutes, failure to comply with the publication requirements of 5 U.S.C. § 552, the pleading regulations of the Department, and the notice requirement of 5 U.S.C. § 554, violation of the holding limitation was not grounds for forfeiture of an entry, the IBLA decision was not suppoted by substantial evidence nor warranted by the facts, estoppel from retroactively applying the 1966 interpretation to these entries and estoppel by failure to afford the entrymen an opportunity to rescind arrangements claimed to be illegal, deprival of the use and benefit of the irrigation system and water rights without due process, violation of the entrymen's rights to due process, and finally, that the entries were contracts controlled by the law in effect at the time they were made, which should be construed most strictly against the Government as the party who drafted those contracts. The complaints sought damages against the Government, as well as issuance of patents. The District Court had jurisdiction under 28 U.S.C. §§ 1361 and 1331.

Both sides moved for summary judgment. The government's motion was stated in broad terms, but its supporting memorandum stated the questions presented to be whether (1) the IBLA's findings of fact were supported by substantial evidence, (2) the

IBLA's interpretation of the holding prohibition of 43 U.S.C. § 329 had a rational basis, and (3) the Government was estopped from cancelling the entries.

The District Court, without discussing the legislative history of § 329, ruled that the IBLA's interpretation was not without any rational basis and was entitled to great weight, and affirmed that interpretation. The District Court, after adopting the ALJ's findings of fact as being "correctly found *** based upon the evidence,"[9] ruled that the cancellation was an abuse of discretion and that the IBLA was estopped from enforcing forfeiture of the entries without any opportunity to the entrymen, who were admittedly acting in good faith, to equitably redeem themselves from the change in policy which occurred long after final proof. The District Court also held that the IBLA's decision violated the spirit and intent of 5 U.S.C. § 552.

The District Court characterized the transactions as "assignments" of the entries and applied the policy of a decision and a regulation of the Department[10] in holding that the "assignments" which had been submitted to the BLM could not be recognized on account of disqualification of the assignee, and disallowed the assignments and held that title would be considered as retained in the entrymen. The judgment of the District Court was that the entrymen were allowed until May 1, 1977 to divest themselves of the "disqualifying assignments" and that patents would be issued

---

[9] Appendix F, at F-2.

[10] *Freeman v. Larson*, 48 L.D. 519 (1922); 43 C.F.R. 2226.1-2(c)(3) (1964).

upon proof of divestiture, otherwise the IBLA's decision would be affirmed.

The Memorandum of the District Court[11] did not discuss any other issues, and it did not make any ruling on the claim for damages.

Before the District Court ruled on the divestiture documents filed by the entrymen the Government appealed to the United States Court of Appeals for the Ninth Circuit. The entrymen cross-appealed. Neither party raised the issue of whether the IBLA's finding on the knowledge element of estoppel was controlling over the ALJ's contrary finding. The Ninth Circuit reversed, [12] holding that (1) the interests of the entrymen had not vested because the patents had not actually issued, (2) the transactions were assignments under 43 U.S.C. § 324, (3) the IBLA's decision was consistent with the Secretary's 1966 decision in *Indian Hill*, supra, (4) the IBLA's finding that the Government did not have knowledge of the transactions was controlling over the ALJ's findings, (5) the IBLA was not estopped from applying the change in interpretation because the knowledge element of estoppel was not satisfied, (6) compliance with 5 U.S.C. § 552 was not required because of the Government's lack of knowledge of the transactions, (7) the District Court exceeded its powers in ordering that patents must issue upon proof of divestiture, and (8) the IBLA's decision must be affirmed. A petition for rehearing was denied. The entrymen's petition for a

[11] Appendix F.

[12] 593 F. 2d 851 (9th Cir., 1978), App. A.

writ of certiorari was denied by this court.[13] In that petition the entrymen contended that several issues, including the contract theory, the constitutional issues and the defective pleading issue had not been determined and remained open for determination by the District Court.

After the mandate went down to the District Court, the entrymen moved for leave to amend the complaint by adding eleven additional counts including the equal protection element of due process, the insufficient notice element of due process, violation of 5 U.S.C. § 557(c), and violation of due process for failure to rule upon all issues, lack of jurisdiction to cancel the entries for violation of the holding limitation, lack of subject matter jurisdiction by reason of insufficient notice, violation of the right of due process because the statute, as applied, was unconstitutionally vague, violation of due process by reason of impermissible prejudice, denial of due process by reason of combination of policy-making, prosecutorial and administrative functions in the administrative proceedings, laches, and waiver of the right to cancel the entries by acceptance of full payment of the purchase price and by other conduct. The District Court held that all issues in the case had been decided by the judgment of the Ninth Circuit, denied the motion for leave to amend, and entered an order dismissing the action and the complaint. The entrymen moved for an order amending the findings, conclusions and judgment, contending, among other things, that the Court

---

[13] 444 U.S. 863, 62 L. Ed. 2d 86, 100 S. Ct. 133 (1979).

of Appeals had no jurisdiction to consider the appeal, because the 1976 judgment of the District Court was not a final judgment because the District Court had retained jurisdiction to rule on the divestiture documents filed by the entrymen, there was no ruling on the damage claims and on other issues, and there was no certification under Rule 54(b), F.R.Civ. P. The entrymen also contended that the intention of the parties controlled interpretation of the contracts created by the entries. The motion was denied and the entrymen again appealed to the Ninth Circuit.

On the second appeal the Ninth Circuit held that all issues had been decided on the first appeal and affirmed the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

This case raises important questions of jurisdiction, statutory interpretation, administrative and judicial procedure, and due process. The opinions of the IBLA and of the courts below in this case are in direct conflict with many decisions of this Court and other courts of appeals. Many issues are involved, but perhaps the most important is whether a new interpretation of a 72-year-old statute can be applied retroactively to amend the contracts and enforce forfeitures against the parcels of land developed at a cost in excess of $700,000.00 and having a present probable value of more than five million dollars, without notice or an opportunity to comply with the new interpretation. We first address the jurisdictional issues.

The administrative charges failed to provide adequate notice of the matters of fact and law asserted, and were insufficient to confer jurisdiction of the administrative proceedings. The jurisdictional defect invalidated the administrative action and the decision of the IBLA was void.[14] The action is further invalidated by the BLM's failure to summarily dismiss the complaints as required by its own regulation, 43 C.F.R. § 1852.1-5(a) (1966).

The Court of Appeals did not have jurisdiction of the first appeal (Morris I) because in its 1976 judgment the District Court (1) reserved jurisdiction to rule on the adequacy of the divestiture documents, (2) did not rule on the damage claims, and (3) made no certification under Rule 54(b). The judgment was not final and the Court of Appeals had no jurisdiction to hear the appeal and was without authority to decide the merits. *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368, 379 (1981). On these grounds the judgments of the Ninth Circuit should be vacated, and the case should be remanded with instructions to recall and vacate the judgment in Morris I and to dismiss the first appeal for want of jurisdiction. Id., at 379-380.

The 1976 judgment of the District Court did not direct the immediate delivery of patents for conveyance of legal title, it did not effect a change in possession or right of possession adversely to the Government, and it did not require the immediate payment of money. The judgment in Morris I was not within the

[14] *Cf., North Alabama Express, Inc.*, v. *United States*, 585 F. 2d 783, 786 (5th Cir., 1978).

exception established in *Forgay* v. *Conrad*, 47 U.S. (6 How.) 201 (1948), which was the basis for the decision in *Sekaquaptewa* v. *MacDonald*, 575 F. 2d 239, relied on by the Ninth Circuit in the second appeal (Morris II).

Even if the Ninth Circuit had jurisdiction in Morris I, that jurisdiction was limited to the estoppel and 5 U.S.C. § 552 issues that had been decided by the District Court. The *Forgay* exception to the finality requirement of 28 U.S.C. § 1291 is no broader than the "collateral order" exception established in *Cohen* v. *Beneficial Industrial Loan Corporation*, 337 U.S. 541 (1949). See *Abney* v. *United States*, 431 U.S. 651, 662-663 (1977). Only those issues decided adversely to the Government were brought before the Court by the Government's appeal in Morris I.[15] The entrymen did not raise, and were not required to raise, other issues in their cross appeal in Morris I,[16] and probably could not have raised other issues because, having consented to the 1976 judgment by filing the divestiture documents, they agreed to that judgment, so long as it remained in existence. *Cf., Donovan* v. *Penn Shipping Co., Inc.*, 429 U.S. 648, 649 (1977).

When the Ninth Circuit decided the estoppel and § 552 issues in favor of the Government in Morris I, the only grounds necessary for reversal were established[17] and the Court's duty was to remand for fur-

[15] See, e.g., *Ex Parte French*, 91 U.S. 423 (1875); *Loudon* v. *Taxing District of Shelby County*, 104 U.S. 771, 774 (1882); *Alexander* v. *Cosden Pipe Line Co.*, 290 U.S. 484, 487 (1934).

[16] *Century Investment Corporation* v. *United States*, 277 F. 2d 247, 251 (9th Cir., 1960).

[17] *See Barker Painting Co.* v. *Local No 734, Brotherhood of Painters, Decorators, and Paperhangers of America, et al.*, 281 U.S. 462 (1930).

ther proceedings, such action being essential to protect the entrymen and preserve their right to urge grounds that were not disposed of by the District Court's 1976 judgment.[18]

The effect of the judgment in Morris I, as interpreted by the courts below, was to grant summary judgment in favor of the Government on grounds that the Government had not raised by its motion for summary judgment, and that had not been considered by the District Court. The judgment in Morris I thus deprived the entrymen of the opportunity to dispute facts material to the other issues raised by the complaint or to present legal arguments on issues not considered by the District Court, and it clearly was error for the Ninth Circuit to do so. *Fountain* v. *Filson*, 336 U.S. 681, 682-683 (1949). In their petition for rehearing in Morris I the entrymen stated that the case should be remanded for consideration of certain other issues.

The courts below did not have jurisdiction to determine that the transactions constituted assignments of the entries.[19] The IBLA did not disturb the ALJ's ruling that the transactions did not constitute assignments and there was no case or controversy regarding assignments and no jurisdiction existed to interpret or apply 43 U.S.C. § 324. *Cf., Hodel v. Virginia Surface Mining and Reclamation Association*, 452 U.S. 264,

---

[18] *Cf., Neely* v. *Eby Construction Co.*, 386 U.S. 317, 325-326 (1977); *Slocum* v. *New York Life Insurance Co.*, 228 U.S. 364, 398-400 (1913).

[19] The Ninth Circuit also ruled that the assignments violated 43 U.S.C. § 324 App. A at A-3. Its statement (id.) that the IBLA held that the arrangements violated § 324 was patently erroneous.

294; n. 36 (1981). The IBLA's action must be measured against 43 U.S.C. § 329, under which the action was taken, and not against 43 U.S.C. § 324. *Cf., American Textile Institute* v. *Donovan*, 452 U.S. 490, 540 (1981).

In any event the courts below were wrong in holding that the mortgages and leases amounted to assignments of the entries. The decisions and regulations of the Department clearly recognize that an assignment of a desert land entry is a transfer of the entire interest of the assignor, by which the assignee succeeds to all rights of the original entryman.[20] The cited regulation states that when the BLM recognizes the assignee, he "takes the place of the assignor as effectively as though he had made the entry." It was error for the courts below to disregard the regulation, *INS* v. *Wang*, 450 U.S. 139, 143 (1981), and to hold that the transactions were assignments.

The regulations of the Department require that contest complaints contain a statement of the facts relied on[21] and that the notice of hearing (in obedience to 5 U.S.C. § 554) contain a statement of the matters of fact and law asserted.[22] The administrative complaints did not state that the mortgages and leases, in combination, constituted a holding under 43 U.S.C. § 329, or that the activities of Sailor Creek constituted such possession and control and the receipt of such benefits as to constitute a holding under § 329. The

---

[20] *Albert A. Bandy*, 41 L.D. 82 (1912); *Wallace S. Bingham*, 82 I.D. 377 (1975), 43 C.F.R. § 2521.3(c)(3) (1981 Revision).

[21] C.F.R. § 1852.1-4(a)(4) (1966).

[22] 43 C.F.R. § 1852. 3-3 (1966).

notice of hearing did not state those facts, nor did it state that the Deparment was asserting as a matter of law that possession, control and receipt of benefits under mortgages and leases could constitute a holding under § 329 or that the new interpretation of § 329 constituted failure to comply with the requirements of law so as to be grounds for forfeiture of the entries.

The Department is required to follow its procedural regulations, even though the procedure provided may be generous beyond the requirements that bind the Department.[23] The Department's failure to comply with its pleading regulations deprived the entrymen of their right "***to be fairly advised of what the Government proposes and to be heard upon its proposals before it issues its final command."[24]

The procedure followed by the Department deprived the entrymen of a fair and adequate hearing because the standards to be applied were neither evolved nor announced until issuance of the decision holding that those standards had been violated. *Cf., Hill* v. *Federal Power Commission*, 355 F. 2d 355 (5th Cir., 1964). The necessity for evidence on the elements of possession, control and receipt of benefits characterized by the IBLA as constituting a holding of desert land was not at all apparent from the complaints or from the notice of hearing, nor was it apparent that evidence was necessary on the question of the propriety of retroactive application of a new interpretation of § 329. The deci-

[23] *Vitarelli* v. *Seaton*, 359 U.S. 535, 540-546 (1959); *Service* v. *Dulles*, 354 U.S. 363 (1957).

[24] *Morgan* v. *United States*, 304 U.S. 1, 18, 19 (1938); *Willner* v. *Committee on Character & Fitness*, 373 U.S. 96, 105 (1963).

sion of the IBLA should be set aside by reason of the failure to comply with the procedural regulations and 5 U.S.C. § 554.

It was error for the courts below to defer to the IBLA's interpretation of 43 U.S.C. § 329, because it was not made contemporaneously with the enactment of the statute, was inconsistent with other decisions, and was contrary to the legislative history.[25] In 1894 the Secretary referred to the holding limitation as relating "simply to the quantity of lands which one person could thereafter enter" and as amending "the act of 1877 as to the quantity of land that could be entered by any one person or association of persons." *Robert B. Gardinier,* 19 L.D. 83, 85. In 1895 this Court referred to the holding limitation as the "provision relating to the quantity of desert lands that any person or association of persons might appropriate." *United States* v. *Healey,* 160 U.S. 136, 148-149. In 1891 the Department held in *Bond's Heirs* v. *Deming Townsite,* 13 L.D. 665, 667, that the Desert Land Act was not a settlement law and that all the work of improvement could be accomplished by an agent instead of by the entryman. The Department held in 1899 that exceeding the holding limitation of § 329 did not warrant cancellation of an entry.[26] In *Williams* v. *Kirk,* 38 L.D. 429 (1910), the Department held that financial assistance could be rendered, so long as it was not used to obtain an agreement to transfer title. Contemporaneously with these entries the Department held in 1964 that development and farming con-

[25] *Andrus* v. *Shell Oil Co.,* 446 U.S. 657, 667-668 (1980).

[26] *Heinzman* v. *LeTroadec's Heirs,* 28 L.D. 497.

tracts that did not amount to agreements to transfer title did not violate § 329.[27]

In August of 1964, after these entries had been fully developed and proof and payment had been made, the BLM ruled that the development leases and mortgages used in the Indian Hill project did not violate § 329, and that only the holdings of entrymen, not those of mortgagees or lessees, were covered by § 329. In this case the IBLA recognized that Sailor Creek did not acquire the leases until 1965. 82 I.D. 146, at 150-151, App. E, at E-9, E-10.

This Court has held that to hold land a person must have some form of title to that land. The proposition is stated in *Harden* v. *Fisher*, 14 U.S. (1 Wheat.) 300, 301:

> "***To avail themselves of this treaty, the lessors of the plaintiff below must show that their ancestors held the lands for which this suit was instituted at the time when it was made. The court does not mean to say that they must show a seizin in fact, or an actual possession of the land, but that the title was in him at the time.***"

Orr v. *Hodgson*, 17 U.S. (4 Wheat.) 453 (1819), also recognizes and holds that in order to hold land it is essential to have some interest in the title to the land. Id., at 464. *Bright's Lessee* v. *Rochester*, 20 U.S. (7 Wheat.) 535 (1822), held that the existence of title was essential to holding land, id., at 545, that the title of the lessee is the title of the lessor, that the lessee holds

[27] *Glenn W. and Margie R. Jensen*, A-29887.

by virtue of the lessor's title and rests upon it to maintain his possession, and that the lessee has no independent right in himself. Id., at 547. These principles were confirmed eight years before the enactment of § 329 in *Robertson* v. *Pickerell*, 109 U.S. 608, 614-615 (1883), and it should be presumed that Congress had these principles in mind when it used the word "hold" in § 329.[28]

The leases created no title interest and did not amount to holding by Sailor Creek. The mortgages of the "anticipated title(s)" (App. A, at A-2) did not create the title interests that would create holdings by Sailor Creek. The interest created by the mortgages was for security purposes only and was not beneficial in nature, thus the entire beneficial interest remained in the entrymen. *Cf., S.R.A.* v. *Minnesota*, 327 U.S. 558, 570 (1946).

The holding limitation did not exist prior to the enactment of § 329 in 1891. Leases and mortgages thus unquestionably were permitted prior to 1891, and the question is whether Congress intended the holding limitation to amend the Desert Land Act so as to prohibit leases and mortgages. It is not sufficient that the transactions came within the dictionary definition of "hold", or that exceeding the holding limitation came within the dictionary definition of "failure to comply with the requirements of the law." The word and the phrase also must be the type of transaction that Congress intended to prevent.[29]

[28] See, e.g., *The Abbotsford*, 98 U.S. 440, 444 (1879); *Kepner* v. *United States*, 195 U.S. 100, 124 (1904); *Lorillard* v. *Pons*, 434 U.S. 575, 583 (1978).

[29] E.g., *Andrus* v. *Charlestone Stone Products Co.*, 436 U.S. 604, 611, (1978); *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 459, 460, 463 (1892); *Watt* v. *Alaska*, 451 U.S. 259 (1981).

The IBLA held that "hold" has no fixed definition. App. E, at E-11. Even if the word was not itself ambiguous, the addition of the phrase "by assignment or otherwise" makes it ambiguous. The IBLA's interpretation eliminated that ambiguity by simply eliminating the qualifying phrase and determining that a holding of any kind whatsoever violates § 329. The most logical explanation is that in the preceding clause of § 329 Congress authorized issuance of patents to the assignees of original entrymen, and its purpose was to make clear that it did not want anyone acquiring title from the Government to more than 320 acres, whether by original entry or by assignment or through an agreement to convey title after receiving patent or any equivalent transaction.[30]

Nowhere in the history of the Desert Land Act or in the legislative history of § 329 does there appear any discussion of leases. Concern about mortgages was expressed in 1888, but the amendment then under discussion was not enacted. The committee report on § 329 indicated only a purpose to prevent speculative accumulations and to require actual reclamation of the land. 22 Cong. Rec. 3613 (1891). Speculative accumulations referred to obtaining assignments of large areas, which were retained in hopes that the price would go up so that the entries could be reassigned to other parties at an increased price. Both leases, and mortgages to secure repayment of funds borrowed for development, assist in actual reclama-

[30] This interpretation avoids the constitutional vagueness question. *Lorillard* v. *Pons*, 434 U.S. 575, 577.

tion, and enhance, rather than impede, the purposes of § 329.

The 1891 debate expressed concern only about the limitation on the right to assign entries, to which the sponsors responded "There is provision for assignment, but not to an amount more than 320 acres" and "It is impossible for any one citizen to acquire more than 320 acres of cultivable lands." 22 Cong. Rec. 3614 (1891). Congress' understanding of *hold* was indicated in a remark by one of the sponsors of § 329, when he referred to a proposition in a previous Congress that would have given "the holder of a desert-land claim the right to mortgage his land to secure money to reclaim or improve it." 22 Cong. Rec. 3616 (1891). The indication is that the entryman is the holder of the claim.

The lack of any reference to leases, coupled with the failure of the officials charged with enforcement of the law to issue any regulations or decisions indicating that leases were included in the holding limitation, indicates that Congress did not intend the holding limitation to cover leases. If such transactions are regarded as contrary to current public policy, that is a matter for Congress, and not the IBLA, to cure by appropriate legislation.

Under the IBLA's interpretation, actual possession is an essential element of holding land. 82 I.D. at 151-152. In other cases the IBLA has recognized the well established principle that possession by a tenant is in law possession by his landlord. *Minnie E. Wharton, et al*, 79 I.D. 6, 12 (1972), citing *Catholic Bishop* v.

Gibbon, 158 U.S. 170 (1895). In *Alaska Placer Co.*, 84 I.D. 990 (1977), interpreting a mining law involving a holding requirement, the IBLA unequivocally held that possession by a tenant of a public land claimant is in law the claimant's possession and that the claimant may avail himself of the benefits of that possession. Id., at 999-1001.[31]

The IBLA's interpretation is in direct conflict with decisions of this Court made before the holding limitation was enacted. *Catholic Bishop* v. *Gibbon*, supra, indicated that in order to hold land, there "must be an occupancy in one's own right, and not under and dependent upon another." 158 U.S. at 168. *Rector* v. *Gibbon*, 111 U.S. 276 (1884), recognized that the tenant of a claimant under a public land law holds the property for the claimant, id., at 284, and that permissive occupation under the claimant, as tenant or otherwise, does not impair the rights of the claimant, id., at 287.

Congress presumably was aware of this Court's rulings regarding possession of public lands, and had it intended to limit the quantity of land that could be leased to a single tenant, it would have done so in more explicit and appropriate language. It also is presumed that Congress, if it intended possession to be an element of the holding limitation, adopted this Court's previous interpretations and intended that possession by a tenant would be in law possession by the entryman, thus restricting the holding limitation

[31]Two of the judges who decided *Alaska Placer Company* were on the panel that decided this case.

to holdings by the entryman. If it did not so intend, the statute is unconstitutionally vague.

It was error for the Ninth Circuit to rule in Morris I that interests of the entrymen had not vested. The Desert Land Act is a statutory offer by the Government to sell land to qualified citizens. Cf., *Pennoyer* v. *McConnaughy*, 140 U.S. 1, 19 (1891). The entrymen accepted that offer by filing their applications and paying the initial payment of twenty-five cents per acre, and contracts for the sale of the land were created at that time. Id. at 19-20; *Barnhurst* v. *State of Utah*, 30 L.D. 314, 318 (1900). Certain rights vest in the entryman when the contract is created, including the right to complete his purchase and to perfect title by further compliance with the terms of the act, according to the interpretations of the act in effect at the time the entry is made. *Instructions*, 6 L.D. 145, 146-147 (1887); *In re Evans*, 253 F. 956, 958-959 (D. Idaho, 1916). These contracts cannot be changed without the consent of the other parties, e.g., *Union Pacific Railroad Company* v. *United States*, 99 U.S. 700, 719 (1879), and the rights are protected by the Fifth Amendment requirement of due process. *Cf.*, *Lynch* v. *United States*, 292 U.S. 571, 580 (1934).

By its very title the Desert Land Act is an act for "the sale of desert land***." Act of March 3, 1877, 19 Stat. 377. A sale is "a contract between parties to give and to pass rights of property for money — which the buyer pays or promises to pay to the seller for the thing bought and sold.***." *Williamson* v. *Berry*, 49 U.S. (8 How.) 495, 544 (1850). Under the contract the

legal title remains in the Government, the possession passes to the entryman, and an equitable interest vests in the entryman to the extent of the payments made by him. *Cf., Jennison* v. *Leonard,* 88 U.S. 302 (1875). The intention of the parties must be considered in interpreting the contracts. *Cf., Hollerbach* v. *United States,* 233 U.S. 165, 171-172 (1913).

When the entrymen made final proof and final payment they completed performance of their contracts, and the right to receive patents vested in them. That right is treated as the equivalent of actual issuance of the patents.[32] At that time the entrymen were entitled to sell the land to any person or entity, without approval of the BLM, even though the holding limitation states on its face that it applies until the issuance of patent. *Cf., French's Lessee* v. *Spencer,* 62 U.S. (21 How.) 228 (1859). The right is recognized by a regulation which provides that after final payment the land can be sold without obtaining approval from the BLM. 43 C.F.R. § 232.18(a) (1963). It was error for the Ninth Circuit to disregard this regulation in its ruling on the vesting issue. *INS* v. *Wang,* supra.

The reason for the policy and the nature of the entryman's rights were stated in *Benson,* supra, N. 32:

> "***when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business of the Land Department causes delay. But such delay, in the mere administration of affairs, *does not*

[32] See, e.g., *Stark* v. *Starr,* 73 U.S. (6 Wall.) 402, 418 (1968); *Benson Mining & Smelting Co.* v. *Alta Mining & Smelting Co.,* 145 U.S. 428 (1892).

diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties." (Emphasis supplied.) 145 U.S. at 431-432.

The IBLA had no authority to impose additional requirements based on interpretations developed after the initial and final rights of the entrymen had vested.

The authority of the Secretary to enforce and carry into execution the Desert Land Act is limited by 43 U.S.C. § 1201 to enforcement "by appropriate regulations." If § 1201 unduly restricts the Secretary, that is a matter for Congress to remedy, and neither unwarranted assumption of authority by the Secretary, nor unauthorized grant of authority by the courts, should be countenanced in the face of this express statutory limitation. Neither the Secretary, nor the IBLA as his delegate, had the authority to adopt and apply the IBLA's interpretation of § 329 through adjudication proceedings. There being no valid regulations defining the holding limitation or the failure-to-comply-with-the-requirements-of-law provision as the IBLA defined them in this case, its decision should be set aside as being in excess of statutory authority and without observance of procedure required by law.

When these entries were made § 329 had been in force for more than 70 years, which was ample time for the Secretary to issue interpretive regulations defining the holding limitation. In view of the Department's comprehensive duties and activities in administering the Desert Land Act, its silence regarding

leases must be deemed significant. See, e.g., *Southern Pacific Transportation Co.* v. *Commercial Metals*, ____ U.S. ____ (No. 81-622, decided April 27, 1982). More importantly, the lapse of 70 years, with knowledge at least during the period from 1950 to 1965 that development leases were commonplace for desert entries in Idaho[33] precludes any sincere argument that it was necessary to bypass the rule-making procedures of the Administrative Procedure Act (APA). If the interpretations are regarded as interpretive rules, they cannot be enforced against the entrymen prior to publication in the Federal Register as required by 5 U.S.C. § 552. The Ninth Circuit's ruling that knowledge by the Government is required before compliance with § 552 is necessary is wholly without support in the language of the statute or in any decision of this Court.

Because the IBLA's interpretations affect the entrymen's rights and obligations, by limiting their use of the land and their right to contract for the use and possession of the land, those interpretations are substantive rules that, if authorized, can be made binding only through the rule-making procedures of 5 U.S.C. § 553, and 5 U.S.C. § 558(b) expressly provides that a sanction (such as cancellation of the entries) "***may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law."

Because the interpretations are substantive rules, the Secretary was required to afford interested persons general notice of proposed rule making and an

[33] App. F, at F-11-F-12.

opportunity to comment before the substantive rules were promulgated.[34] The Government has never contended that any effort was made to comply either with § 552 or with § 553, and it was error for the Ninth Circuit to permit enforcement of the interpretations without compliance with the procedural safeguards of the APA.

Even if the Secretary had the power to adopt the interpretation through adjudication, the IBLA abused its discretion by applying the new interpretation retroactively to transactions entered into by the entrymen several years earlier in reliance on the existing regulations and decisions of the Department, which gave no warning that leases were prohibited and which expressly authorized mortgages.[35]

The ALJ found that the BLM knew before the entries were allowed that the entrymen intended to lease the entries to a single farm operator.[36] The administrative record contains testimony by Morris and Noble on that point, supporting the ALJ's findings. The IBLA made its finding that the Government had no knowledge of the entrymen's intentions to lease their entries solely on the letters sent by the Land Office to the entrymen after final proof had been submitted (AR, Ex. G—2, Doc. 33) See 82 I.D. at 159, App. E at E-26. In *Steadman* v. *SEC*, 450 U.S. 91, 101, this Court noted that the intent of Congress embodied in 5 U.S.C. § 556(d), was that "where there is evidence pro

---

[34] 5 U.S.C. § 553; *Chrysler Corporation* v. *Brown*, 441 U.S. 281, 313 (1979); *Buschmann* v. *Schweiker*, 676 F. 2d 352 (9th Cir., 1982).

[35] *N.L.R.B* v. *Bell Aerospace Co.*, 416 U.S. 267, 294-295 (1974); *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107 (1971).

[36] App. D, p. D-24.

and con, the agency must weigh it and decide in accordance with the preponderance.***" Section 556(d) requires that an administrative decision be in accordance with the reliable, probative, and substantial evidence. The IBLA made no effort to explain why it rejected the ALJ's findings on the knowledge issue or why it did not consider any evidence other than the cited exhibit. It was error for the Ninth Circuit to accept the IBLA's finding under these circumstances; at the very least it should have remanded for an explanation of why the IBLA rejected the ALJ's findings, including his implied finding on the credibility of the witnesses, and for explanation of why the exhibit was accepted as proof of the fact over the entrymen's hearsay objection, without analysis of its reliability and probative value.[37]

The District Court based its first decision on estoppel and 5 U.S.C. § 552, making it unnecessary for that court or the Court of Appeals to decide any of the constitutional issues.[38] The Government's motion for summary judgment did not address the constitutional issues, and it would be an abuse of discretion and a denial of due process to permit the courts below to decide the constitutional issues with the case in its present posture.[39] It was also error for the District Court to deny the entrymen's petition for leave to amend by adding other constitutional claims after the mandate went down on the first appeal.[40]

[37] *Cf., Calhoun* v. *Bailar*, 626 F. 2d 145 (9th Cir., (1980); *Hoska* v. *U.S. Department of the Army*, 667 F. 2d 131-139 (D.C. Cir., (1982).

[38] See, *e.g., Rescue Army* v. *Municipal Court*, 331 U.S. 549, 568-569 (1947); *Ashwander* v. *TVA*, 297 U.S. 288, 347-348 (1935); *Harris* v. *McRae*, 448 U.S. 297, 306-307 (1980).

[39] *Fountain* v. *Filson*, supra; *United States* v. *Standard Oil Company of California*, 618 F. 2d 511, 520-521 (9th Cir., 1980).

[40] *Hormel* v. *Helvering*, 312 U.S. 552, 560 (1941).

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that a writ of certiorari be issued to review the judgments and opinions of the United States Court of Appeals for the Ninth District.

W. F. RINGERT
Attorney for Petitioners